Supreme Court, U.S.
FILED
MAR 1 - 2000
CLERK

(2)

No. 99-941

In the Supreme Court of the United States

DOROTHY FORTE, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
DAVID M. COHEN
ANTHONY J. STEINMEYER
JAMES M. KINSELLA
MICHAEL M. DUCLOS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

12pp

QUESTION PRESENTED

Whether petitioner may raise, for the first time before this Court, First and Eighth Amendment challenges to her discharge from federal employment for obscene and abusive language and disrespectful conduct to Veterans' Administration police officers.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Austin v. *United States*, 509 U.S. 602 (1993)	7
Bell v. *Wolfish*, 441 U.S. 520 (1979)	7
Browning-Ferris Indus. of Vt., Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989)	5, 7
Connick v. *Myers*, 461 U.S. 138 (1983)	5
Ingraham v. *Wright*, 430 U.S. 651 (1977)	7
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	5
Pennsylvania Dep't of Corrections v. *Yeskey*, 524 U.S. 206 (1998)	5
Pickering v. *Board of Educ.*, 391 U.S. 563 (1968)	5
Wallace v. *Department of the Air Force*, 879 F.2d 829 (Fed. Cir. 1989)	4
Waters v. *Churchill*, 511 U.S. 661 (1994)	5
Webster v. *Department of the Army*, 911 F.2d 679 (Fed. Cir. 1990), cert. denied, 502 U.S. 861 (1991)	6
Whitley v. *Albers*, 475 U.S. 312 (1986)	7

Constitution, statute and rule:

U.S. Const.:	
Amend. I	4, 5, 6
Amend. VIII	4
Cruel and Unusual Punishment Clause	6, 7
Excessive Fines Clause	6, 7
5 U.S.C. 7513(a)	4

Rule—Continued: Page

Sup. Ct. R. 10 6

In the Supreme Court of the United States

No. 99-941

DOROTHY FORTE, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 194 F.3d 1338 (Table). The decision of the arbitrator (Pet. App. 3-73) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1999. The petition for a writ of certiorari was filed on September 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was formerly employed as a nurse at the Veterans' Administration Medical Center in Houston, Texas, for six years. Pet. App. 35. She also served

as chief steward for the union of professional employees at the hospital. *Id.* at 36. On the morning of February 21, 1997, petitioner was in the lobby of the hospital passing out flyers announcing a meeting that concerned the firing of a local union representative by Haymon Parker, the then-acting local union president. *Id.* at 36-37. Because the time and place of the meeting as stated on the flyer conflicted with a previously scheduled meeting, Warren Robicheaux, the senior labor relations specialist at the hospital, questioned petitioner about the flyer. *Id.* at 37. Petitioner at first ignored Robicheaux, but then began yelling at him. *Ibid.* Robicheaux instructed petitioner to stop distributing the flyer and to stop shouting, but petitioner continued. *Ibid.* Robicheaux then summoned the Chief of the VA Police and Security Service. *Id.* at 38. When security arrived, petitioner again was asked to cease distributing the flyer and to stop causing a scene, but she remained belligerent. *Ibid.* When one officer tried to reach for her arm, petitioner dropped to the floor and began kicking and screaming. *Ibid.* Four officers then subdued and handcuffed petitioner; in the process, one officer was kicked in the shoulder and another was kicked in the left hand or forearm area. *Id.* at 38-39.

One month later on March 21, 1997, petitioner telephoned Haymon Parker in his office at the hospital, cursing him and stating, "You are a dead man." Pet. App. 39. Petitioner did not identify herself, but Parker recognized her voice. He had recently removed her as chief steward for the union. *Ibid.* Parker was shaken by the telephone call and an incident later that afternoon when someone banged loudly on his office door; the VA police were called. *Id.* at 39-40.

Petitioner was called to the VA police office for questioning by Sergeant Fred Gray. Pet. App. 40. While

being questioned, petitioner shouted at Sergeant Gray, using profanity and a racial epithet. *Id.* at 41; Pet. 3. Petitioner was then given a letter barring her from the VA Medical Center and placing her in a non-duty paid status. Pet. App. 41. After petitioner refused to read or sign the letter, it was read to her. Shortly thereafter, petitioner jumped up from her seat in the police office and ran for the door leading back into the hospital. *Ibid.* Two officers physically stopped petitioner, and she was restrained and temporarily placed in a holding cell. *Ibid.*

As a result of these incidents, the hospital issued petitioner a notice of proposed discharge on April 2, 1997, specifying five charges against her. Pet. App. 41-42, 84-87. The first three charges related to the February 21, 1997 incident, charging (a) deliberate refusal to carry out a proper order, (b) attempt to inflict bodily injury upon VA police officers, and (c) obscene language and disrespectful conduct. *Id.* at 84-85. The remaining two charges stemmed from the events of March 21, 1997, charging (d) use of obscene language, disrespectful conduct, and statements constituting a threat to inflict bodily injury upon Parker, and (e) obscene and abusive language and disrespectful conduct to Sergeant Gray and other VA police officers. *Id.* at 85.

2. Pursuant to the terms of the collective bargaining agreement, petitioner invoked arbitration. Following a seven-day hearing, the arbitrator upheld the hospital's removal action based upon Charge (e) alone. Pet. App. 72-73. The arbitrator found that the agency had proved that petitioner committed the misconduct underlying all five charges. *Id.* at 46-60. The arbitrator also concluded, however, that there was not a sufficient nexus between the misconduct in the first four charges and promoting the "efficiency of the service," as required by

5 U.S.C. 7513(a) for a removal action. Pet. App. 72-73. Instead, the arbitrator determined that those actions related to union activities and an internal union dispute. *Id.* at 73. As for the last charge, however, the arbitrator concluded that it was "fundamentally different" from the other charges because there was a sufficient nexus between the efficiency of the service and petitioner's "totally inappropriate" conduct. *Ibid.* The arbitrator further held that the penalty of discharge for that conduct was reasonable. *Ibid.*

3. Petitioner appealed to the Federal Circuit. That court affirmed without opinion. Pet. App. 1-2.

ARGUMENT

The court of appeals correctly affirmed the arbitrator's decision to uphold petitioner's termination. The judgment of the court of appeals does not conflict with the decisions of this Court or any other court of appeals. Furthermore, neither the arbitrator nor the court of appeals has decided an important question of federal law that needs to be addressed by this Court. Further review is not warranted.

1. Petitioner's claims (Pet. 5-9) are not properly before this Court. At no time in the proceedings before the arbitrator or before the court of appeals did petitioner raise any First or Eighth Amendment claim with respect to her termination.[1] This Court ordinarily will not consider in the first instance issues that were

---

[1] Petitioner did argue before the court of appeals that her removal was a pretext for retaliation for her union activities. Pet. C.A. Br. 15-18. That claim, however, was not presented as a First Amendment claim. Moreover, that claim was never presented to the arbitrator (Pet. App. 32-35) with "sufficient specificity and clarity" and thus was waived before the Federal Circuit. *Wallace* v. *Department of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989).

not raised or decided below, especially when the issue is raised in seeking reversal of the judgment. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Pennsylvania Dep't. of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998); *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 277 & n.23 (1989). Petitioner presents no reason to deviate from this settled principle.

2. Even if petitioner's First Amendment claims were properly before this Court, they are without merit and would not warrant review. Petitioner contends that her termination violated her First Amendment rights because (1) it was based solely on her utterance of a racial slur and (2) it was a pretext for retaliation on account of her union activities. Pet. 5-9. Although petitioner did not forfeit her First Amendment right to speak out or legitimate matters of public concern as a condition of public employment, see *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968), this Court has held that

> when a public employee speaks not as a citizen upon matters of public concern, *but instead as an employee upon matters only of personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick v. *Myers*, 461 U.S. 138, 147 (1983) (emphasis added). See also *Waters* v. *Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion) (noting that government employer can bar its employees from using offensive utterances to people with whom they work). Petitioner's racial slur against the hospital security sergeant was

plainly not speech about a matter of public concern, but simply a display of her own personal animus toward a fellow hospital employee. The First Amendment does not prevent a public employer from terminating an employee for utterances like that of petitioner, especially when accompanied by conduct such as hers.

Petitioner additionally claims (Pet. 9) that she was removed because of "her aggressive pursuit of protected activities." That factual argument is inconsistent with the arbitrator's detailed findings. The arbitrator found that Charge (e) in particular, involved "misconduct while on the job" in reaction to the employer's "legitimate and proper" investigation into alleged threats. Pet. App. 60. The arbitrator also found that petitioner did not prove that the agency had conspired with petitioner's opponents in the union to harass her and her supporters. *Id.* at 66-67.[2] Petitioner cites no evidence to support her claim or to cast doubt on the arbitrator's finding that she was removed to promote the efficiency of the service. Further review of this factual issue is unwarranted. See Sup. Ct. R. 10.

3. Likewise, petitioner's Eighth Amendment claim, if properly before this Court, is without merit. Relying on the Cruel and Unusual Punishment and Excessive Fines Clauses of the Eighth Amendment, petitioner contends (Pet. 9) that her discharge "constitutes disproportionate punishment for the offense committed." The Cruel and Unusual Punishment Clause, however, applies only to criminal prosecutions and punishments.

---

[2] Because petitioner did not raise retaliation as an issue, the arbitrator made no specific finding on that question. Had petitioner alleged retaliation, however, she would have borne the burden of proving it. See *Webster* v. *Department of the Army*, 911 F.2d 679, 689 (Fed. Cir. 1990), cert. denied, 502 U.S. 861 (1991).

See *Whitley* v. *Albers*, 475 U.S. 312, 318-319 (1986); *Bell* v. *Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Ingraham* v. *Wright*, 430 U.S. 651, 664, 666-668, 671 n.40 (1977). Petitioner's termination from employment therefore presents no claim of cruel or unusual punishment.

The Excessive Fines Clause is also inapplicable to this case. As this Court has stated, "at the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a *payment* to a sovereign as punishment for some offense." *Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 265 (emphasis added). Also, "the history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Id.* at 268. See also *Austin* v. *United States*, 509 U.S. 602, 609-610 (1993) (noting that Excessive Fines Clause limits power of government to extract payments as punishment for an offense). Because petitioner has been assessed no fine, she has no claim under the Excessive Fines Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuily submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DAVID M. COHEN
ANTHONY J. STEINMEYER
JAMES M. KINSELLA
MICHAEL M. DUCLOS
Attorneys

MARCH 2000